Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1088

IN THE

Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS AND CARA WOODS,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF ABBREVIATIONS

"Petitioners" and/or "The Railroad"	Either of these terms is intended to refer to the petitioners in the present proceedings which were the appellants in the Eleventh Circuit Court of Appeals and the defendants in the District Court.
"Respondents" and/or "Woods"	Alan Woods and his wife, Cara Woods, were the plaintiffs in the original action. They were the appellees in the Eleventh Circuit appeal and are the respondents in the present petition.
"Rule 8" and "Rule 38"	Either of these phrases is intended to refer to the applicable Federal Rule of Appellate Procedure.
"Subject Statute"	This phrase is intended to refer to Code of Alabama § 12-22-75 (1975).
"P BR"	Petitioner's Brief.

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ARGUMENT

1. The Alabama Affirmance Fee Statute Does Not Violate The Fourteenth Amendment.

Note: This issue is already before the Court. The constitutionality of the subject statute is before this Court in another appeal from the Alabama Supreme Court. See *Aetna Life Insurance Co. v. Lavoie,* 53 U.S.L.W. 3847 (No. 84-1601, 4 June, 1985).

The Alabama Supreme Court has previously upheld the constitutionality of the affirmance fee statute. *Central of Ga. Ry Co. v. Steed,* 287 Ala. 64, 76, 248 So.2d 110 (1971).

The railroad's argument that the subject statute is violative of the equal protection clause of the Fourteenth Amendment is based on the assumption that the paramount and controlling purpose of the statute is to discourage frivolous appeals. P BR pp. 7-8 Citing *Montgomery Light & Water Power Company v. Thombs,* 204 Ala. 678, 87 So. 205 (1920). [Hereinafter *Thombs*]. As to the *Thombs* case, the Alabama Supreme Court subsequently noted:

> "While this court *incidentally observed* in Montgomery Light & Water Power Co. v. Thombs (citing) that§ 6153, Code (the predecessor to § 12-22-73) was intended to penalize frivolous or delay appeals, *it was not intended to assert that such was the only purpose, . . .*"
>
> *Snellings v. Builders Supply Co.,* 229 Ala. 1, 156 So. 858 (1934). (Emphasis supplied).

In point of fact, the Alabama Supreme Court in an even later case held that "in our view, *the real purpose* of § 814 (a later predecessor of § 12-22-73) was to *provide appellate litigants with the additional damages* from superseded judgments when an affirmance has been ordered. *City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So.2d 174 (1950). (Emphasis supplied).

The Eleventh Circuit has recognized this as the paramount purpose of the Alabama statute.

> "The Alabama Supreme Court applied the 10 percent penalty, noting that the statute's purpose was to provide appellee litigants with additional damages from superseded judgments when an affirmance fee has been ordered."
>
> *Locke v. Allstate Insurance Co.,* 696 F.2d 1340, 1342 (11th Cir. 1983).

The subject statute does not impose any classification based on invidious factors such as race, nor does it affect any fundamental right.

This Court has consistently recognized that as long as a state provides a full and fair trial on the merits, there is no require-

ment under the due process clause of the fourteenth amendment that appellate review be provided as well. See *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). [Hereinafter *Lindsdey*]. The Alabama Constitution contains no specific provision for appellate review. See *Ex parte Tsimpides*, 272 Ala. 430, 434-37, 131 So.2d 873 (1961), cert. denied 369 U.S. 804 (1962); *Johnson v. Barnes*, 250 Ala. 292, 34 So.2d 144 (1948). The right of appeal in Alabama is entirely statutory and is therefore subject to the conditions (such as the subject statute) enacted by the Alabama legislature.

Although states do not have a unfettered right to place restrictions on rights of appeal they do grant, state procedures must be upheld if they are rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3254 (1985) [hereinafter *Cleburne*]; *Lindsey*, 405 U.S. at 78. In making this analysis, such state actions are given wide latitude and are presumed to be valid. *Cleburne*, 105 S.Ct. at 3254.

The above stated purposes of the subject statute represent legitimate state interests since Alabama clearly may act to discourage insubstantial appeals which burden the legal system and to encourage prompt payment of judgments. See *Lindsey*, 405 U.S. at 78.

The railroad cites *Lindsey* in support of its position as if to argue that the Alabama statute is analagous to the double bond requirement which the Court struck down in *Lindsey*. In that case, however, no legitimate state interest was advanced for a bonding requirement which distinguished landlords from tenants. Indeed, there the bonding requirement was placed on those least able to meet it – tenants – and seemed design to simply foreclose access to an appeal. The Alabama statute instead is directed specifically at parties with an incentive to cause delay.

This Court upheld an identical statute in *Louisville & Nashville Railroad Co. v. Stewart*, 421 U.S. 261, 263 (1916), on these grounds. Justice Holmes wrote:

> "The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas, and the law of the state makes 10 percent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld."

The subject statute is applicable to money damages affirmed on appeal. It is the first in a sequence of three statutes, each of which provides for a ten percent affirmance fee.[1] Each of these statutes are an integral part of an overall state scheme by which the state of Alabama administers its judicial system. For a period of over a hundred and sixty years[2] by a number of statutes enacted by the Alabama legislature and by a number of rules adopted by the Alabama Supreme Court, the State of Alabama has established a cohesive pattern of law governing every aspect of the Alabama's judicial system from filing costs to affirmance fees. The ruling which petitioner seeks would compel an intrusion by the federal courts into the state of Alabama's overall scheme for the administration of its judicial system and would result in a disruption of the integrated network of statutes and rules which make up the Alabama judicial system.

The Alabama judicial system is a function of many interconnecting statutes and rules most (if not all) of which have counterparts in the Federal Rules of Civil Procedure and/or the Federal Rules of Appellate Procedure. The railroad's position would require this Court to ignore the legal, equitable,

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[1]See also Alabama Code § 12-22-73 (1975) (right of property); Alabama Code § 12-22-74 (1975) (recovery of chattels).

[2]The subject statute was first enacted by the Alabama Legislature in 1820. Clay's Digest, 309, § 20. See *Ex parte Weissinger & Crook*, 7 Ala. 710, 712 (1845); *Lawrence v. Jones*, 37 Ala. 388, 389 (1861). It has since been readopted in essentially the same form in ten subsequent recompilations or recodifications of the Alabama Code. The legislative history of the subject statute appear in parenthesis at the end of the statute in the Alabama Code.

and practical considerations which influenced the Alabama legislature and the Alabama Supreme Court to enact and/or to adopt the various statutes and rules which together make up Alabama's judicial system. This would accomplish the realization of the fear that Justice Harlan expressed in his concurring opinion in *Hanna v. Plummer,* 380 U.S. 460 (1965):

> ". . . it is hard to think of a case where a conflicting state rule would be allowed to operate even though the state rule reflected policy considerations which, under *Erie* would lie within the realm of state legislative policy."
>
> *Hanna* at 480.

The railroad argues in effect that the Alabama statute would be better taken if it were more limited. However, the Alabama legislature concluded that the statute should apply automatically, perhaps believing that the deterrent effect on non-meritorious appeals would be greater and the burden on the courts of enforcing the penalty would be less. Whether that is so is the business of the legislature. As the Court held in *Williamson v. Lee Optical,* 348 U.S. 483, 487-88 (1955):

> "The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

2. The Alabama Affirmance Fee Statute Should Be Applicable In The Eleventh Circuit Court of Appeals In Diversity Actions Governed By Alabama Law.

The railroad contends that the Alabama statute conflicts with *Fed. R. App. P.* Rule 38 and *Fed. R. App. P.* Rule 8. The railroad's argument on this point is based on its interpretation of this Court's holding in *Hanna v. Plummer,* 380 U.S. 460 (1965). [Hereinafter *Hanna*].

NOTE: We first note that the identical argument was advanced by the appellant/petitioner and rejected by the Eleventh Circuit in *Jackson v. Magnolia Brokerage Company,* 742 F.2d

1305 (11th Cir. Ala. 1984) cert. denied ___ U.S. ___, 105 S.Ct. 2704, 86 L.Ed.2d 720 (1985). See Appendix I.

What follows is Woods' response on the merits of this argument.

In *Hanna* and subsequently in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) [hereinafter *Walker*] this Court clarified the analysis which a federal court should employ when, in an action based upon the court's exercise of diversity jurisdiction, a state law is alleged to conflict with a federal rule of procedure. If the federal rule "directly conflicts" with the state law, the court must then determine whether the federal rule is within the scope of the Enabling Act, 28 *U.S.C.* § 2072 (1977), and is supported by a constitutional grant of federal power. *Hanna* at 471-474; *Walker* at 749.

The railroad asserts that a *Hanna* analysis would reveal that in view of Rules 8 and/or 38, *Fed. R. App. P.*, it would be improper for a federal court in a diversity case to give application to Alabama's affirmance fee statute.

Woods believes that petitioner's view of *Hanna* is defective. The railroad contends, in effect, that whenever it appears that the issue in question is merely addressed by the federal rule, a *Hanna* analysis is essential. According to petitioner, *Hanna* requires almost mechanical disregard for state law on all matters which are covered by a federal rule.

Respondents submit that a *Hanna* analysis that compels a federal court to disregard state law is dependent upon a preliminary finding of the existence of a "direct collision" or an "unavoidable collision" between the federal rule and the state law. *Hanna* at 470, 472; *Walker* at 749. In determining the existence of a direct collision, the court should give consideration to the effect that application of the state law would have on the federal rule. In *Hanna* this Court dealt with a state law which if given effect would have totally defeated the purpose and the operation of the applicable federal rule. This Court alternately noted:

> "The Erie rule has never been invoked to *void* a Federal Rule. It is true that there have been cases where this

Court had held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded *displacement* of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law."

Hanna at 470. (Emphasis supplied).

"To hold that a Federal Rule of Civil Procedure must *cease to function* whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress's attempt to exercise that power in the Enabling Act."

Hanna, Id. at 473-474. (Emphasis supplied). See also *Walker* at 747-48.

Respondents submit that there is no direct or unavoidable collision between the subject statute and federal Rules 8 and/or 38 which voids or displaces these federal rules or causes them to cease to function.[3]

The Alabama statute is directed to a specific class of cases not expressly governed by Rule 38 and does not even purport to address the matters governed by Rule 8.

The Alabama statute applies only if three conditions are present: (1) a money judgment is entered; (2) the judgment is stayed on appeal; and (3) the appellate court affirms the judgment. *Snellings v. Builder's Supply,* 229 Ala. 1, 155 So.

[3]It should be noted that the contrary is not true. Petitioner's position, if adopted, would completely vitiate the Alabama statute. In consequence, defendants (citizens and non-citizens alike) in diversity actions in federal courts in Alabama would be accorded significantly different and better treatment than defendants in the state courts of Alabama. This effect is offensive to the *Erie* rationale (see *Hanna,* headnote 11 at 467) and would provide defendants with an illegitimate motive to remove cases to the federal court.

858 (1934). Rule 38, in contrast, permits the appellate court to award damages and costs to any appellee if it determines that his appeal is frivolous.

It is significant to note that the Supreme Court of Alabama has adopted a state counterpart to federal Rule 38. *Ala. R. App. P.* Rule 38.[4] The two rules are virtually identical. The railroad's contention that there is a direct conflict between the subject statute and federal Rule 38 which has the effect of voiding or displacing the federal Rule or ceasing its function is utterly inconsistent with the fact that the Alabama Supreme Court has applied *both* the affirmance fee statute and the state frivolous appeal rule. See *McAnnally v. Levco, Inc.*, 456 So.2d 66, 67 (Ala. 1984). See also *Hutson v. Hutson*, 351 So.2d 588, 591 (Ala. Civ. App. 1977).

The Alabama affirmance fee statute is not designed to supplant the authority of an appellate court (state or federal) to impose monetary sanctions on appellant's who prosecute frivolous appeals. Thus, both state and federal Rule 38 — and — the Alabama statute are parallel, not conflicting. Both the state and the federal rule apply only to frivolous appeals whereas the statute applies only to money judgments stayed on appeal and later affirmed. Put another way, each Rule covers ground which the statute does not.

Thus, neither in purpose nor in operation does the Alabama statute directly collide with federal Rule 38.

Nor does the Alabama statute conflict with Rule 8, *Fed. R. App. P.* That Rule merely provides that a federal court of appeals may stay a judgment pending appeal and may condition such relief upon the filing of a bond or other security. Rule 8 does not purport either to provide for or to prohibit the assessment of costs or damages against an unsuccessful appellant.

As Justice Harlan observed in his concurring opinion in *Hanna*, the *Erie* decision reflected more than just the Court's concerns about forum-shopping and equitable administration

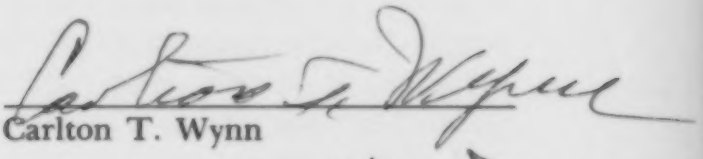
[4]In so doing, the Alabama Supreme Court did not repeal § 12-22-72 *Ala. Code* (1975). See Appendix II, part A, to the *Ala. R. App. P.* which lists the statutes which are superseded or modified by the rules.

of the laws. 380 U.S. at 474. That decision remains "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of power between the state and federal systems." *Id.* Alabama has not seen fit to permit the recovery of prejudgment interest on money judgments in tort cases. Prejudgment interest is recoverable in 25 states and in federal courts in actions arising under federal law. See Appendix II. The Alabama affirmance fee statute has an ex ante prejudgment interest effect which compensates the injured plaintiff for the additional expenses and attorney fees associated with an appeal and for the loss of the use of the money judgment retained by the defendant during the pendency of his appeal. As the Fifth Circuit correctly concluded in *Proctor v. Gissendaner,* 587 F.2d 182, 184 (5th Cir. 1979), for purposes of *Erie* the Alabama statute is *substantive* — not merely procedural as the railroad contends. As *Hanna* and *Walker* indicate, the *Erie* analysis is supplanted only if the state statute directly conflicts with a federal rule of procedure. If not, the state's policies, as embodied in its own statutes, must be honored by the federal court. Such is the case here.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,



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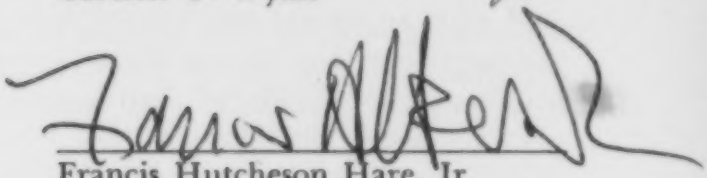

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APPENDICES

APPENDICES

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON, et al.,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Alabama

(November 21, 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

O R D E R :

IT IS ORDERED that the application for 10% allowance to judgment pursuant to Title 12, Code of Alabama, Section 12-22-72 (1975) be, and the same hereby is, GRANTED.

The Fifth Circuit decided in *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979), that the Alabama statute which provides for the addition of 10% of a judgment which is stayed and unsuccessfully appealed is binding in a federal appellate court under *Erie v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1938). This Court has adopted the decisions of the Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981 as binding precedent of this Court, subject to overrule only by the court sitting *en banc. Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981). Accordingly, this Court is bound by *Proctor. See Locke v. Allstate Ins. Co.,* 696 F.2d 1340 (11th

Cir. 1983) ; *King v. Ford Motor Co.*, 604 F.2d 317 (5th Cir. 1979) . *See also Walters v. Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) ; *but see Affholder v. Southern Rock*, ... F.2d ..... (5th Cir. 1984) [No. 83-4420].

APPENDIX II

A. STATES WHICH PERMIT RECOVERY OF PREJUDGMENT INTEREST IN TORT CASES

1. Alaska Stat. §§09.50.270; 45.45.010 (enacted 1968).
2. Cal. Civil Code §3291 (enacted 1982).
3. Colo. Rev. Stat. §13-21-101 (enacted 1935).
4. Conn. Gen. Stat. §37-3a (enacted 1981).
5. Hawaii Rev. Stat. §636-16 (enacted 1979).
6. Iowa Code §535.3 (enacted 1980).
7. La. Rev. Stat. Ann. §13-4203 (enacted 1916).
8. Me. Rev. Stat. Ann. tit. 14 §1602 (enacted 1969).
9. Md. Cts. & Jud. Proc. Code Ann. §11-301 (enacted 1980).
10. Mass. Ann. Laws Ch. 231 §6B, supp. §11 (enacted 1946).
11. Mich. Comp. Laws §600.6013 (enacted 1965).
12. Nev. Rev. State. §1 (b) 1974 (enacted 1979).
13. N.H. Rev. Stat. Ann. §524:1-b (enacted 1957).
14. N.J. Rev. Stat. §4:42-11 (b).
15. N.Y. Estates Power & Trust Law §5-4.3 (enacted 1967).
16. N.C. Gen. Stat. §24-5 (enacted 1981).
17. Ohio Rev. Code Ann. §1343.03 (enacted 1982).
18. Okla. Stat. tit. 12, §727 (2) (enacted 1971).
19. Pa. Con. Stat. §2.31 Rule 2.38 (1979).
20. R.I. Gen. Laws §9.21-10 (enacted 1958).
21. Tenn. Code Ann. §47-14-123 (enacted 1979).
22. Utah Code Ann. §15-1-4; 7-8-27-44 (enacted 1975).
23. Va. Code 8.01-382 (enacted 1979).
24. W. Va. Code §56-3-31 (enacted 1981).
25. Wis. Stat. §807.01 (enacted 1980).

B. PARTIAL LIST OF FEDERAL CASES WHICH RECOGNIZE THE RECOVERABILITY OF PREJUDGMENT INTEREST IN CASES ARISING UNDER FEDERAL LAW.

1. *Rodgers v. United States,* 332 U.S. 371 (1947). (Recognition of general proposition that federal courts may exercise equitable powers to grant prejudgment interest in certain cases arising under federal law.)
2. *Bricklayers' Pension Trust Fund v. Taiariol,* 671 F.2d 988, 989 (6th Cir. 1982) (Labor-Management Relations Act of 1947 and the Employment Retirement Income Security Act of 1974.)
3. *Olsen v. Shell Oil Co.,* 708 F.2d 976 (5th Cir. 1983) (Outer Continental Shelf Lands Act)
4. *Moore-McCormack Lines, Inc. v. Richardson,* 295 F.2d 583, 592-595 (2nd Cir. 1961), cert. denied 368 U.S. 989 (1962) (Death On The High Seas Act)
5. *Noritake Co. v. M/V Hellenic Champion,* 627 F.2d 724, 728 (5th Cir. 1980) (Death On The High Seas Act)
6. *General Motors Corp. v. Devex Corp.,* 461 U.S. 648 (1983) (patent infringement)
7. *National Airlines, Inc. v. Stiles,* 268 F.2d 400 (5th Cir. 1959)
8. *Mayer v. Branniff Airways, Inc.,* 310 F.Supp. 194 (N.D. Ill. 1970)
9. *In re Air Crash Disaster Near Chicago,* M.D.L. 391 (N.D. Ill. 1979)